No. 89-1030

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

GWENDOLYN BROWN,

Petitioner,

v.

JAMES G. LEDBETTER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether recipients of public assistance have enforceable rights within the meaning of 42 U.S.C. § 1983 to bring actions in the federal courts for alleged violations of the Child Support Enforcement Act, Title IV-D of the Social Security Act, 42 U.S.C. § 651 *et seq.*

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respondent James G. Ledbetter respectfully requests that this Court deny the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit. That opinion is reported as *Wehunt v. Ledbetter,* 875 F.2d 1158 (11th Cir. 1989).

STATEMENT OF THE CASE

This action originated in the District Court for the Northern District of Georgia in an action brought by Joy D. Wehunt. Plaintiff Wehunt sued the Commissioner of

the Georgia Department of Human Resources (hereinafter the Commissioner) and the Secretary of Health and Human Services (hereinafter the Secretary). The suit was brought pursuant to 42 U.S.C. § 1983. Plaintiff Wehunt alleged that Defendants had violated her rights pursuant to the Child Support Enforcement Act, 42 U.S.C. § 651, *et seq.*[1] The issue in this Petition is whether this Act creates enforceable rights to sustain an action under § 1983.

Wehunt's claims under the Child Support Enforcement Act were that the Commissioner had failed to provide her with necessary services to locate the absent father of her child, to establish paternity of the child, and to enforce a support obligation for the child. Plaintiff Wehunt asserted that the Secretary had failed in his duty to oversee Georgia's operation of its state plans under Titles IV-A and IV-D and in his obligation to enforce compliance by the Commissioner with the conditions of participation in the AFDC program. The original complaint of Plaintiff Wehunt is included as Respondent's Appendix A, App. 1-23.

On October 23, 1985, the district court granted the motion of Brenda White and Gwendolyn Brown (hereinafter Petitioner) to intervene as Plaintiffs and to file an amended complaint. Their amended complaint is

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[1] Joy Wehunt (now Joy Lewallen) also brought a claim under Title IV-A of the Social Security Act, the Aid To Families With Dependent Children Act, 42 U.S.C. § 601, *et seq.* This claim was resolved through a consent order and is no longer at issue.

included as Respondent's Appendix B, App. 24-57. Plaintiffs further moved for class certification. On May 27, 1986, Respondent filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12. The Secretary filed a similar motion on May 23, 1986. On October 1, 1986, the trial court entered an order dismissing the Petitioner's claims against the Commissioner under 42 U.S.C. § 1983. The Court subsequently dismissed all claims against the Secretary and denied as moot Petitioner's Motion for Class Certification.

Petitioner and her co-Plaintiffs below are recipients of public assistance under the Aid To Families With Dependent Children program (AFDC). As a condition of receipt of AFDC, they are required to assign to the State their rights to collect support. 42 U.S.C. § 602(a)(26)(A). The AFDC program is included as part A of Title IV of the Social Security Act. 42 U.S.C. § 601 *et seq*. The Child Support Enforcement Act is part D of Title IV of the Social Security Act. 42 U.S.C. § 651 *et seq*. The states which participate in the AFDC program must also participate in the Title IV-D child support recovery program. 42 U.S.C. § 602(a)(27). Although the Social Security Act previously contained some provisions regarding collections of child support as part of the AFDC program,[2] the Child

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[2] Prior to 1975, the AFDC state plan requirements provided that states, effective July 1, 1952, must provide notice to law enforcement officials of children who had been deserted or abandoned. Social Security Amendments of 1950, Pub. L. No. 734, § 321(b), 64 Stat. 477, 549-50 (1950). States were required to provide for entering into cooperative arrangements with

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Support Enforcement Act was created as a part of the Social Services Amendment of 1974. Social Security Amendments of 1974, Pub. L. No. 93-647, Part B, § 101, 88 Stat. 2337, 2351 (1974).

The Child Support Enforcement Act requires any state participating in the AFDC program to create a distinct governmental unit to recover child support. Prior to 1975 monthly "countable income" for AFDC eligibility included child support payments. Since 1975, each AFDC recipient is required to assign to the State any rights to support which any person in the AFDC grant group may have. 42 U.S.C. § 602(a)(26)(A). This assignment is an express condition of receiving AFDC. *Id.* Support which is collected by the state agency must be distributed according to the distribution scheme in 42 U.S.C. § 657(b). Under this scheme, the first fifty dollars of support collected goes to the family. 42 U.S.C. § 657(b)(1).[3] The

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appropriate courts and law enforcement officials to assist in establishing paternity and collecting child support. Social Security Amendments of 1967, Pub. L. No. 90-248, § 201(a)(1)(C), 81 Stat. 821, 879 (1967) (amending 42 U.S.C. § 602(a)).

[3] Until 1984, the collections primarily went to the state and federal governments to reimburse the government for the payments which had been made to the family. However, pursuant to § 2640(b)(1) of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, codified at 42 U.S.C. § 657(b)(1), effective October, 1984, the first fifty dollars of the amounts collected in each month for an AFDC family are paid to the family without affecting its eligibility for benefits.

remainder of the monthly support payments goes to the state and federal government to reimburse the public treasury for assistance payments made to the family. This statutory scheme is designed to recoup monies paid by taxpayers on behalf of children from the absent parents who should be supporting their children.

The legislative history of the Child Support Enforcement Act reveals that Congress was concerned with children who were receiving AFDC because they had been deprived of the support of a parent. "The problem of welfare in the United State is, to a considerable extent, a problem of the non-support of children by their absent parents." S. Rep. No. 93-1356, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 8133, 8145. Therefore, the Child Support Enforcement Act was primarily designed to encourage states to locate absent parents and to obtain support payments in order to have children supported by their parents rather than through public assistance. *Id.* at 8146.

The Secretary of the Department of Health and Human Services establishes standards for the child support program and reviews and approves state plans which must be accepted in order for the state to receive federal money. 42 U.S.C. § 652(a)(1)(2)(3). The Act details the requirements which the state plan must contain. 42 U.S.C. § 654. The Act requires that the state "undertake" to establish paternity of children who receive AFDC and "undertake" to secure support for children receiving AFDC from their responsible parents. 42 U.S.C. § 654(4)(A)(B). The state receives a specified percentage of the administrative cost of the program pursuant to 42 U.S.C. § 655. In addition to the appropriations made to

the state under § 655, 42 U.S.C. § 658 provides for incentive payments made to the states for collections made in a cost effective and efficient manner.

As Petitioners note, Georgia is a "fill-the-gap" state. Petition at 7. This means that an AFDC family may receive a supplemental AFDC payment to fill the gap between the states "payments standard" and its "standard of need". This supplemental payment is made pursuant to 42 U.S.C. § 602(a)(28). In contrast to Petitioners' statement, this is not a receipt of child support collections but is a supplemental payment made from Title IV-A funds.

The original Plaintiff Joy D. Wehunt alleged that the Commissioner had failed to provide her with adequate and timely child support recovery and paternity establishment services. The State has since been successful in receiving child support on her behalf and she is no longer a party to this action. Petitioner Brenda White is also no longer a party to the action. Petitioner Gwendolyn Brown has three minor children and receives benefits under the Aid To Families With Dependent Children (AFDC) program. As to one of those children, Kateia Nicole Pinkston, Ms. Brown originally alleged that there had been no paternity determination as to this child. The Commissioner has been successful in obtaining an order of paternity concerning Kateia Pinkston and since May, 1989, her father has been paying child support on her behalf. Appellants' other two children were born during her marriage to Jerry Blane Brown. Under a divorce decree, Petitioner's former husband was ordered to pay child support for these two children. Mr. Brown has made payments towards the support of these children pursuant

to a wage assignment. Therefore, subsequent to the events described by Petitioner, Petition at 10, Petitioner Brown has received services from the Respondent.

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS CORRECTLY APPLIED THE LAW IN FINDING NO SUFFICIENTLY SPECIFIC AND DEFINITE RIGHTS TO BE ENFORCEABLE UNDER § 1983.

A. THE COURT OF APPEALS PROPERLY APPLIED THE CASE LAW CONCERNING ENFORCEABLE RIGHTS UNDER 42 U.S.C. § 1983.

Petitioner alleges that she has rights under the Child Support Enforcement Act, 42 U.S.C. § 651 *et seq.* which are enforceable under 42 U.S.C. § 1983. Section 1983 provides redress for the deprivation of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States. In *Maine v. Thiboutot*, 448 U.S. 1 (1980), this Court made clear that an action under § 1983 may be based solely upon violation of a federal statute. *Id.* at 4-5. Although a § 1983 claim may be based on a federal statute, this Court has recognized two limitations to the application of § 1983 to remedy statutory violations. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), and *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981). The *Sea Clammers* limitation applies where Congress in enacting the statute in question has foreclosed private enforcement for violations of the statute through

its comprehensive remedial scheme. The *Pennhurst* limitation applies where the statutory provisions involved encourage state services but do not create enforceable rights. The focus under this exception is whether rights are sufficiently "specific and definite to qualify as enforceable rights under *Pennhurst* and § 1983". *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 432 (1987).

The opinion of the Eleventh Circuit in the current case correctly outlines the law pertaining to enforceable rights under 42 U.S.C. § 1983. App. 24-A – 26-A. Contrary to Petitioner's argument, the Eleventh Circuit did not unduly rely upon *Cort v. Ash*, 422 U.S. 66 (1975). Petitioners correctly note that in *Cort v. Ash* this Court established a four-prong test for determining when a cause of action can be implied from a federal statute. The first factor of the *Cort* test examines whether the Plaintiff is "'one of the class for whose especial benefit the statute was enacted,' . . . that is, does the statute create a federal right in favor of the Plaintiff?" *Id.* at 78. The Eleventh Circuit properly used this prong of the *Cort* test as a tool in determining whether the federal statute creates rights enforceable under § 1983. App. 28-A – 30-A. The opinion quoted from *Edwards v. District of Columbia*, 821 F.2d 651 (D.C. Cir. 1987) in which that court utilized *Cort's* first factor to analyze the question of whether a public housing statute created rights enforceable under § 1983. As did the court in *Edwards*, the circuit court in the current case has simply utilized the established case law in implied cause of action cases to aid in examining the related question of whether § 1983 creates enforceable rights. Other circuits have similarly utilized the first *Cort*

factor in examining § 1983 questions. *Id.; Clallam County v. Department of Transportation of the State of Washington,* 849 F.2d 424 (9th Cir. 1988), *cert. denied* 190 S.Ct. 790 (1989).[4] Accordingly, the Eleventh Circuit did not improperly rely on *Cort v. Ash* but rather used the first *Cort* factor as a guideline in examining whether enforceable rights exist under § 1983 in these circumstances.

Petitioners would have it appear that the first *Cort* factor (whether Plaintiff is of the class for who especial benefit the statute was enacted) is diametrically opposed to the *Pennhurst* exception to a § 1983 cause of action, where Congress has not created enforceable rights. Rather than being two very separate doctrines, the two inquiries are actually quite similar. This similarity is noted in the dissenting opinion in *Wright v. City of Roanoke Redevelopment and Housing Authority,* 479 U.S. 418 (1987). "Whether a federal statute confers substantive rights is not an issue unique to § 1983 actions. In implied right of action cases, the Court also has asked, since *Cort v. Ash,* 422 U.S. 66, 78 (1975), whether 'the statute create[s] a federal right in favor of the Plaintiff.' " *Id.* at 432-433; *see also Clallam County,* 849 F.2d at 428. Whether the question is phrased in *Cort v. Ash* terms of "especial benefit" or in *Wright v. City of Roanoke* terms of "specific and definite" benefits, the issue is basically the same.

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[4] The Ninth Circuit in *Clallam* stated: "the second exception – whether the statute was the kind that did not create enforceable rights – seems tautological. Our court, however, has interpreted the requirement as similar to the 'especially benefited class' prong of *Cort v. Ash* . . . ." *Id.* at 428.

That is, the court must consider whether the Plaintiffs under the facts alleged have sufficient rights found in either the Constitution or laws to create rights enforceable under § 1983. This most basic inquiry is required by the language of § 1983 itself which redresses deprivation of rights "secured" by the laws of the United States. In the current case, the Eleventh Circuit correctly found no such enforceable rights secured by the statute at issue.

B. THE ELEVENTH CIRCUIT REACHED THE CORRECT RESULT IN FINDING THAT PETITIONER HAS NO ENFORCEABLE RIGHTS UNDER § 1983.

As argued above, the Eleventh Circuit properly understood and applied the law in this area. Assuming *arguendo* that the court should not have been guided by *Cort v. Ash*, the result, using *Pennhurst* and *Wright* exclusively, is the same. In *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981), this Court considered whether Congress intended through the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (42 U.S.C. § 6000 *et seq.*) to create enforceable rights which could be enforced through § 1983. That Act created a federal-state grant program whereby the federal government provides financial assistance to states to aid them in creating programs to care for the developmentally disabled. The provisions of the Act expressed a congressional preference for certain types of treatment for disabled individuals. *Id.* at 19. However, this Court found that Congress intended to

encourage, rather than mandate, better services to the disabled. *Id.* at 20.[5]

The child support recovery program is primarily designed to require able absent parents to provide for their children rather than having the family rely on public assistance. The legislative history surrounding the 1974 enactment of the Child Support Enforcement Act demonstrates that Congress was primarily concerned with collecting support in order to reduce the welfare roles. *See, e.g.*, S. Rep. No. 93-1356, 93rd Cong., 2d Sess., *reprinted* in 1974 U.S. Code Cong. & Admin. News 8133, 8145, 8154, 8158. Except for a brief period at the inception of the program, recipients of AFDC had no financial interest in the collections which the State made until Congress enacted the fifty dollar disregard in October of 1984. The disregard provision, codified at 42 U.S.C. § 657(b)(1), provides that the first fifty dollars of any child support collected goes directly to the family without a reduction in public assistance. The purpose of the disregard is two-fold. First, it encourages the AFDC recipient to assist the State in identifying, locating, and pursuing legal action against the absent father. Additionally, there is some incentive for the absent parent to timely make payments if he knows that a portion of the amount goes directly to support his child. Even with the

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[5] The *Pennhurst* case was remanded to the Third Circuit for consideration of a number of issues. On remand the Third Circuit did not reach the federal issues raised because it determined that Plaintiffs were entitled to relief on purely state law grounds. *Pennhurst*, 673 F.2d 647 (3rd Cir. 1982), *rev'd. Pennhurst State School v. Halderman*, 464 U.S. 89 (1984).

fifty dollar disregard provision, the primary purpose of the program remains the same, that is, to reimburse the federal and state government for their expenditures of public assistance. The largest portion of funds collected go toward that goal.

As in *Pennhurst*, the Child Support Enforcement Act is primarily a funding act. Through both the provision of funding for the child support recovery program and through state plan requirements, Congress intended to legislate by "making declarations of policy and indicating a preference while requiring measures that, though falling short of legislating its goals, serve as a nudge in the preferred direction." *Pennhurst*, 451 U.S. at 19.

The statute in which Petitioner finds her entitlement to the State's child support services is clearly a funding statute. 42 U.S.C. § 651. App. 3-E. The Act further provides financial incentives to the State for compliance and monetary penalties for noncompliance as well as payments for administrative costs in administering the program. 42 U.S.C. §§ 655, 658. In exchange for federal funds, the State must make assurances in its state plan requirement as set out at 42 U.S.C. § 654. 42 U.S.C. § 654(4) provides that the State will "undertake" to establish paternity for a child born out of wedlock and will "undertake" to secure support for that child. Congress clearly recognized that the State will not be successful in collecting child support or establishing paternity in every case; however, it must make assurances that it will undertake to do so. Because the primary thrust of the Child Support Enforcement Act is to recover public assistance monies paid by the state and federal governments, the Petitioner is an incidental beneficiary.

In *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987), this Court found that the Brooke amendment to the Housing Act of 1937 which provided a rent ceiling for tenants of low-income housing created enforceable rights within the meaning of 42 U.S.C. § 1983. The Court concluded, based upon that statute, that the benefits Congress intended to confer upon tenants were "sufficiently specific and definite to qualify as enforceable rights under *Pennhurst* and § 1983". *Id.* at 432. In this case no such specific and definite benefits are created in the Child Support Enforcement Act. The benefit to the AFDC recipient is incidental to the major thrust of the statute, which is to recoup state and federal dollars. In sum, the Child Support Enforcement Act does not create enforceable rights within the meaning of *Pennhurst* and *Wright*. The Eleventh Circuit correctly resolved this issue and this Court need not grant certiorari in this case.

II. THE LAW CONCERNING WHAT RIGHTS ARE ENFORCEABLE UNDER § 1983 IS CLEAR AND THIS COURT NEED NOT GRANT CERTIORARI IN THIS CASE TO ELABORATE ON THE ESTABLISHED LAW IN THIS AREA.

Petitioner asserts that the lower courts need further guidance in determining when enforceable rights under 42 U.S.C. § 1983 exist. In fact, the *Pennhurst* and *Wright* decisions make quite clear what standards the courts should apply in making that determination.

Petitioner argues that there is a question in the circuits concerning the relationship between the *Maine v. Thiboutot* and *Cort v. Ash* decisions which this Court

should resolve. Although Petitioner cleverly makes it appear that such confusion exists, this is simply not the case. *Maine v. Thiboutot* stands for the general proposition that causes of action under 42 U.S.C. § 1983 can be premised purely upon federal statutes, rather than requiring a basis in the Constitution. As argued above, the circuit courts have appropriately borrowed portions of the *Cort v. Ash* analysis in determining when rights asserted by Plaintiffs are rights enforceable under § 1983. Contrary to Petitioners' arguments (see Petition at 16), there is no genuine confusion in the circuit courts concerning the relationship between *Thiboutot* and *Cort*.

Petitioner also alleges further confusion in the lower courts. Petitioner states that courts other than the Eleventh Circuit have readily proceeded to enforce Title IV-A and IV-D in cases brought under § 1983. Petition at 19. However, in none of the cases cited by Petitioner at page 19 was the issue of whether a cause of action existed under § 1983 raised. In each of those cases, no mention was made of whether a cause of action under § 1983 existed. Those cases cannot, therefore, be used to show a split of authority among the circuits on the issue raised in this Petition.

Petitioner also alludes to further divergence of opinion among the circuits in deciding whether enforceable rights exist under § 1983. See Petition at 19-24. Instead of showing a dichotomy in the reasoning of the circuit courts, the cases cited by Petitioner represent different results under different statutes. *Clallam County v. Department of Transportation of the State of Washington*, 849 F.2d 424 (9th Cir. 1988), *cert. denied* 190 S.Ct. 790 (1989) (considering the Federal-Aid Highway Act, 23 U.S.C. § 101 *et*

seq., especially §§ 124(8), 301); *West Virginia University Hospitals, Inc. v. Casey*, 885 F.2d 11 (3rd Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3430 (U.S. Dec. 22, 1989) (No. 89-994) (considering the Medicaid Act, 42 U.S.C. § 1396 et seq., especially § 1396a(a)(13)(A)); *Edwards v. District of Columbia*, 821 F.2d 651 (D.C. Cir. 1987) (considering the United States Housing Act of 1937, 42 U.S.C. §§ 1437-1440, especially § 1437p); *Allandale Neighborhood Association v. Austin Transportation Study Policy Advisory Committee*, 840 F.2d 258 (5th Cir. 1988) (considering the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1607 and 23 U.S.C. § 134). Clearly, one would expect different results, and somewhat different analyses, when courts are examining different statutes to determine whether enforceable rights exist.

In sum, any divergence of opinions in this area lies more in the Petitioner's disingenuous categorization of the cases than in reality or is explained by the differences in the particular statutes under consideration. Whatever difference in analysis of enforceable rights issues exists among the circuits is minimal and does not warrant this Court's attention through the granting of certiorari. Additionally, if this Court feels that any further clarification of the issue of when enforceable rights exist under § 1983 is warranted, the Court already has a vehicle for doing that in the case of *Baliles v. Virginia Hospital Assoc.*, No. 88-2043 (argued January 9, 1990).

III. PETITIONER HAS NOT ASSERTED A DUE PROCESS CLAIM WHICH WOULD REQUIRE THE GRANT OF CERTIORARI.

Petitioner alleges that Respondent's administration of the child support recovery program has violated her

right to property secured by the due process clause of the fourteenth amendment. She argues that she was deprived of the economic benefit of child support collections to which she was entitled by the Social Security Act. (Petition at 37-38). Petitioner further suggests that the Eleventh Circuit erred in failing to reach this issue.

Petitioner's due process argument is in fact merely a rewording of her statutory arguments. Because the property rights which she alleges stem solely from the statutes upon which she relies for her enforceable rights under 42 U.S.C. § 1983, her due process argument is in fact synonomous with her statutory argument. That is, Petitioner has no property rights separate and apart from the Child Support Enforcement Act. The Eleventh Circuit properly resolved Petitioner's arguments under the statute and, in so doing, of necessity resolved Petitioner's due process claims. In keeping with long-standing precedent that the federal courts will not pass on constitutional issues where statutory construction will resolve the issue, *see, e.g., United States v. Clark*, 445 U.S. 23, 27 (1979), the Eleventh Circuit appropriately did not address Petitioner's constitutional claims. As such, this Court need not grant certiorari to resolve Petitioner's due process claims.

IV. CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to review the decision of the United States

Court of Appeals for the Eleventh Circuit should be denied.

Respectfully submitted,

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